The underwriters and directors of Giant decided, however, that the issuance of an additional 335,000 shares would dilute the publicly held shares and

> ". . . it was decided that it would be in the interest of both all of the people, plus the people who purchased the stock, to continue this unique produce relationship that had been established with much blood, sweat and tears in order to arrive at the kind of produce standards we have to have. As a consequence, the underwriters felt it would be best to continue the arrangement as it was . . ." (21a)

The prospectus under which the Common Stock A was sold in 1959 fully revealed the relationship between Giant and Max Shapiro (30a):

> "The Company purchases its fruits and vegetables from Max Shapiro, a partnership. The beneficial interests in the partnership are held by the individuals listed under 'Principal Holders of Securities—Beneficial Ownership' herein and members of their immediate families, except that N. M. Cohen and Joseph B. Danzansky have no beneficial interest in the partnership. In the partnership's fiscal year ended January 31, 1959, Max Shapiro's net sales to the Company amounted to $7,657,805, or approximately 8% of Giant's total purchases. This amount represented 100% of Max Shapiro's total sales and 100% of the Company's fresh produce purchases during the period. The prices quoted by Max Shapiro to Giant are dictated by competitive circumstances, and the partnership's net earnings for the fiscal year ended January 31, 1959, before income taxes, partners' salaries and withdrawals, were $334,715 or about 4.4% of Max Shapiro's net sales to Giant. In the past seven fiscal years the corresponding net earnings of Max Shapiro varied from a low of 3.5% to a high of 4.4% of net sales to Giant. Max Shapiro rents its produce warehouse from the Company under

a lease which requires rental payments of $72,000 per year and still has eight years to run. The data contained in this paragraph regarding Max Shapiro are derived from audited statements of the partnership prepared by Schultz, Sorin & Co., independent Certified Public Accountants. It is the intention of the partners of Max Shapiro that net profits of the partnership in future years continue in the percentage range established in the past seven years."

Defendants' answer alleges that plaintiff received a copy of this prospectus "at the time of his purchase" (40a). This defense cause plaintiff's counsel "great concern" (Affidavit of Abraham L. Pomerantz in Support of Application for Allowance) and it may reasonably be inferred that plaintiff had a copy of the prospectus when he purchased his shares. Defendants also contended that pursuant to the Securities Act of 1933 all other persons who bought shares of Giant on the public offering in 1959 received copies of the same prospectus, advising them of Giant's relationship with Max Shapiro and the intent to continue that relationship. In addition to the 1959 prospectus, prospectuses of Giant dated February 24, 1961, October 4, 1961, February 13, 1963 and October 29, 1963 all disclosed the Max Shapiro-Giant relationship. All the prospectuses are on file with the Securities and Exchange Commission and the last four are also on file with the American Stock Exchange. All of them have been open to the inspection of petitioners, all other stockholders of Giant and the public (42a).

The settlement agreed upon by the parties and found by the Vice Chancellor to be fair and reasonable and in the best interests of Giant and its stockholders provided that Max Shapiro and Giant should enter into a 10-year contract under which Max Shapiro would supply Giant's produce requirements. The contract provides that Max Shapiro's annual profits shall be limited to the lesser of 3.9% of its net sales to Giant or $350,000. At the conclusion of the con-

tract period, Giant will have an option to purchase the Max Shapiro business for $1,500,000 (48a).

It is of interest to note the savings to Giant which will result from the contract. For the fiscal year ended January 25, 1964, Max Shapiro's net earnings were $403,767. For the fiscal years ended January 31, 1965 and January 31, 1966, it was estimated in the notice to stockholders that Max Shapiro's net sales to Giant would be $10,700,000 and $12,100,000, respectively. 3.9% of such figures are $417,300 and $471,900, respectively. *Goodman v. Futrovsky, supra* at 3, 213 A. 2d 903. Thus, if the $350,000 profit limitation contained in the contract had been applicable, a savings of $242,967 would have accrued during the 3-year period. In its opinion, the Supreme Court of Delaware valued the total saving to Giant over the 10-year life of the contract at $1,000,000 (11a). And, since the underwriters had suggested that Max Shapiro be sold for $5,360,000 of Common Stock A in 1959, the Supreme Court of Delaware said "that an option to purchase Shapiro for $1,500,000 cannot be said to be inequitable" (11a).

In the courts below, one of defendants' principal arguments in support of the settlement was that the Max Shapiro-Giant relationship did not constitute a fraud on the public stockholders of Giant as charged by the petitioners. The Supreme Court of Delaware agreed with defendants' contention. It said (8a-9a):

> "We think, however, that appellants are wrong when they categorize the original acquisition of Shapiro by the Cohens and Lehrmans as a fraud on Giant . . . It was entirely proper . . . for them to decide to acquire Shapiro and keep its existence separate from Giant . . .
>
> "The situation, therefore, was that the Cohens and Lehrmans at the time the public offer of Giant stock was made owned two separate and distinct businesses. They finally determined to permit the public to buy a

share of only one of them—Giant. This, it seems to us, was their privilege and the buying public may not complain of that decision as long as it was not misled to its injury."

It is difficult to see how the buying public could have been "misled to its injury". Every investor who could read the English language was informed that he was not paying for, and not getting, the earnings of Max Shapiro. Nevertheless, petitioners now seek to take those earnings away from the Cohens and Lehrmans and to add them to the income of Giant. Petitioners are trying to acquire for Giant free of cost what the underwriters had been unable to obtain for a consideration worth $5,360,000.

ARGUMENT.

1. It is well settled that this Court will decline to review state court judgments which are based on adequate non-federal grounds. *Murdoch v. City of Memphis,* 87 U. S. (20 Wall.) 590, 634-636 (1875); *Herb v. Pitcairn,* 324 U. S. 117, 125-126 (1945).

The State of Delaware has consistently adhered to the principle that a court, when called upon to approve a settlement and compromise of pending litigation, is not required to try the issues involved or to decide them on their merits. The court is only called upon to consider the nature of the claims, the possible defenses to them and the material and factual obstacles facing the plaintiff in the event of a trial and exercise a business judgment in determining whether the proposed compromise is reasonable in the circumstances. *In re Ortiz' Estate,* 26 Del. Ch. 240, 27 A. 2d 368, 473 (1942); *Perrine v. Pennroad Corp.,* 29 Del. Ch. 531, 47 A. 2d 479, 488 (1946); *Krinsky v. Helfand,* 38 Del. Ch. 553, 156 A. 2d 90, 94 (1959); *Manacher v. Reynolds,* 39 Del. Ch. 401, 165 A. 2d 741, 748 (1960); *Rome v. Archer,* — Del. Ch. —, 197 A. 2d 49, 54 (1964); *Kleinman v. Saminsky,* — Del. Ch. —, 200 A. 2d 572, 575 (1964), *cert. den.* 379 U. S. 900 (1964); *Hoffman v. Dann,* — Del. Ch. —, 205 A. 2d 343, 352 (1964), *cert. den.* 380 U. S. 973 (1965). Thus, in *Dann v. Chrysler Corporation,* — Del. Ch. —, 215 A. 2d 709, 713 (1965), the Chancellor said.

> "Plaintiffs assert that the settlement did not constitute an adjudication of the merits of the causes of action asserted. This is true in the sense that the process of approving a settlement does not require the court to determine claims on their merits as in ordinary litigation."

In the proceedings below, the Supreme Court of Delaware defined its function as follows (8a):

"We are concerned in this appeal with review of the approval of a settlement of a derivative action. The function of this Court in such a review is merely to determine whether or not the court below has committed an act of judicial indiscretion in approving the settlement in the exercise of business judgment. We do not exercise our own judgment to determine anew the question of the intrinsic fairness of the settlement. *Hoffman v. Dann,* 205 A. 2d 343."

And in *General Foods Corp. v. Cryo-Maid, Inc.,* — Del. Ch. —, 198 A. 2d 681, 684 (1964), the Supreme Court of Delaware said that in reviewing an exercise of discretion by the lower court, it would "only examine the record to determine, if possible, whether or not there could be a reasonable difference of view upon the propriety of his act. If there can be such a different reasonable view, then we have no course but to affirm his act". Since some persons of ordinary sound business judgment would certainly think the settlement of this litigation was fair and reasonable, the decision below can be wholly sustained on independent grounds of state law and this Court should deny the petition.

It is clear, therefore, that the Court of Chancery decided nothing on the merits but merely determined, in the exercise of its best business judgment, that the proposed settlement was reasonable under all the circumstances. The Supreme Court of Delaware also did not adjudicate the merits of the controversy and did no more than determine that the Court of Chancery had committed no judicial indiscretion in approving the settlement. Even if the Supreme Court of Delaware be deemed to have decided anything on the merits, its view that the Max Shapiro-Giant relationship was no fraud on the public stockholders of Giant completely disposed of the case and should be binding on this Court (see *supra,* p. 6).

2. The petition raises no substantial question which this Court should review under 28 U. S. C. § 1257(3). In

considering the proposed settlement, the Vice Chancellor's function was "to consider and weigh the nature of the claim, the possible defenses, and to exercise business judgment in determining whether or not the proposed settlement is reasonable". *Krinsky v. Helfand, supra* at 8, 156 A. 2d 94. The Supreme Court of Delaware merely reviewed the record to determine whether the Vice Chancellor abused his discretion. Petitioners ask this Court to review the settlement of a stockholder's derivative suit where great benefits were received by Giant and where the only issue is whether the Vice Chancellor abused his discretion in approving the settlement.

The principal thrust of petitioners' argument is directed against the statement in the opinion below that it was "most probable that the 1959 purchasers of the Giant stock made their purchases with full knowledge of the separate existence of Shapiro and the intention to continue that separate existence" (10a). That language, however, must be read in the context of settlement and with the realization that the Supreme Court of Delaware was not called upon to decide any issue on the merits. Nevertheless, we submit that the observation of the court below is entirely consistent with the record and with this Court's comment in *Frost & Co. v. Mines Corp.*, 312 U. S. 38, 40 (1940), that "The essential purpose of the [Securities Act of 1933] is to protect investors by requiring publication of certain information concerning securities before offered for sale".

Petitioners consistently overlook the fact that this case involves the judicial approval of a stockholder's derivative suit over which type of litigation "the state has plenary power". *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541, 550 (1948). They argue their case as if it involved a judgment after a trial on the merits and not from a discretionary order approving a settlement. The purpose of a settlement is not to resolve issues, but to avoid the determination of difficult issues, whether factual or legal. On the basis of

the record we submit that the Vice Chancellor did not abuse his discretion when he exercised his business judgment in favor of the settlement and that the Supreme Court of Delaware correctly so held.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition should be denied.

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Appendix.

EXCERPTS FROM DEPOSITIONS.

(2) *

JACOB LEHRMAN, one of the defendants, called as a witness by the plaintiff, being first duly sworn by the Notary Public, testified as follows:

EXAMINATION.

By Mr. Silverman:

* * *

(6)

Q. At some point of time Giant Foods ceased to purchase its produce from a wholesaler and used the services of Max Shapiro. Is that correct, sir?

A. Yes, sir.

Q. When did that happen?

A. In 1940-1939, when we developed approximately four stores. The produce delivered by wholesalers to the individual store represented such a variety of quality that it was obvious to the operational people in Giant serving the

(7)

consumer, that a standard for produce had to be established, and since the purchasing of the produce is a jungle in which standards are not kept, and very few standards are even set by the U. S. Department of Agriculture, it was decided that the best interests of Giant would be served if a central point for delivering all the produce would be established, at which point produce could be screened, and only

* Figures in parentheses refer to page numbers of typewritten transcript.

that produce that represented the standards for the sale to consumers through Giant could be shipped to that particular store, and so at that time a produce company was established in the names of the two families, and this company was called the Washington Wholesale Produce Company.

This Produce Company did not have sufficient buying power to buy truckloads or carloads, so that it would coordinate with other wholesalers in the process of purchasing. Frequently it would buy a third of a truckload, or a half of a truckload, but the other wholesaler would always be the one who took the responsibility for the billing.

The reason for establishing the Washington Wholesale Produce Company was such that if Giant were to set up its own produce operation, the unions at that time had all of the corporate chains organized, whereas none of the wholesale produce companies were organized, and it was obvious to the Giant management that if they wanted to get the quality of

(8)

produce they needed, they had to have a central point at which the produce was delivered. Then the Washington Wholesale Produce Company sold to other retailers. Washington Wholesale Produce Company also had the benefit of having the non union relationship. The wholesale produce companies in the area had a Produce Association in which these wholesale produce companies all worked together in the process of trying to set standards, and of trying to work out hours and regulations that would be of help to the whole industry. So that the service to the Giant consumers on the part of the families was such that they would be better off establishing a wholesale produce business in 1939 or 1940, and they did so.

* * *

(9)

Q. When did the Produce Company adopt the name Max Shapiro?

A. The war, in 1942, imposed on the part of the shipper, the primary seller, the responsibility of setting up quotas, if he was going to be fair to his buyers, because there was not enough product, with the Army and all the rest of the armed services purchasing, and all the merchandising went on a quota system.

The Washington Wholesale Produce Company, which was in existence in 1942, did not have the foresight to get its name on the list. It bought through other wholesalers, and when the quota system was established, the other wholesalers said to the Washington Produce Company, "You don't have any quota with us", so the Washington Produce Company continued to operate as a wholesaler at a tremendous disadvantage, attempting to pick up product.

In 1944 an individual by the name of Max Shapiro, who was one of the largest wholesale produce people in the

(10)

Greater Washington area, elected to sell his business, and it became public knowledge that this business was for sale.

The people who operated the Washington Wholesale Produce Company, in the interest of serving Giant Foods, recognizing that they had tremendous quotas, because Max Shapiro, being the largest wholesaler, and having the largest quotas, decided to purchase Max Shapiro, but not in the name of Washington Wholesale Produce Company, because they would have then lost the quotas. So they purchased the Max Shapiro business and rented the facilities of the Max Shapiro Company, and started and continued to sell both to retailers and to Giant under the name of Max Shapiro.

* * * *

(15)

Q. What function does Max Shapiro perform for Giant Foods?

A. Max Shapiro has the responsibility of being the clearing agent for all produce, to make sure that the stand-

ards of quality that Giant Foods needs in its retail stores will measure up to the qualities established.

As the clearing agent it has the responsibility of assembling and shipping to Giant Foods this merchandise of this particular quality that we have established.

As you will recall, in 1939 when we had the Washington Wholesale Produce Company, we couldn't get the type of quality that we had established, so we had to set up a central clearing agency.

(16)

Q. Does the board of directors review annually or at any other set period the relationship between Giant and Max Shapiro with a view to continuing it or terminating or adjusting the relationship?

A. I would have to—in order to answer your question, I would have to go back to 1959, when a determination in relation to this was made for the board as such, in which it had to make certain conclusions, and that in itself affected what determinations followed from there on. Would you permit me to do that?

Q. Yes, go right ahead, sir.

A. Prior to the prospectus being developed, and the company being marketed, the underwriters, Auchincloss, Parker & Redpath, in urging that Shapiro was a positive value in itself, suggested that the Shapiro Company could be put into Giant, and that the underwriters would provide in their opinion 135,000 shares, that in their opinion would be the value of the Shapiro Company.

As a director at that time, with the Shapiro Company earning $300,000, and with the statement on the part of the directors that this company would pay in the area of 40 cents a share, the individuals in the Shapiro Company felt that in order to get $300,000, that the offer of the underwriter of 135,000 shares was not adequate for the acquisition of the

(17)

Max Shapiro Company, and they suggested a *quid* for the *quo,* and that 750,000 shares be considered the figure that properly represented the value of Max Shapiro. Seven hundred and fifty thousand times 40 cents would then give the individuals the same number of dollars that they were then drawing out of Max Shapiro.

The underwriters recognized that this was a reasonable request and countered in the area that perhaps 335,000 shares would be more right, because then they would get 40 cents a share on the 335,000, and this represented pretty much a dollar a share, which was the earnings of the company at that time, and therefore they would give them a share for each dollar's worth of earnings, or $300,000.

When it was thought through by the directors, that 335,000 shares would have to be issued, for Giant it would dilute the total of all of the shares, and when the underwriters thought through the total proposal offered, it was decided that it would be in the interest of both all of the people, plus the people who purchased the stock, to continue this unique produce relationship that had been established with much blood, sweat and tears in order to arrive at the kind of produce standards we have to have. As a consequence, the underwriters felt it would be best to continue the arrangement as it was, and I as a director from 1959 forward

(18)

have had to look to that particular relationship in making my decisions as to whether it should continue purchasing from the Shapiro Company.

Q. I take it, sir, that after that decision was made in 1959, the board no longer reviewed the relationship between Max Shapiro and Giant, with a view to terminating that relationship?

A. No, it is constantly under review, and the feeling has constantly been that the unique *esprit de corps* that

has been developed within the Shapiro Company for the purpose of serving Giant is a very unique relationship as a consequence, this particular thing should be protected, and since it was made part of the public's awareness during the prospectus and at all times made aware to everybody, that there was no situation here except serving all of the people who were interested in purchasing Giant Food.

Q. Prior to the institution of the lawsuit by Mr. Futrovsky, did any director of Giant suggest at any board meeting that the relationship with Max Shapiro be terminated or curtailed in any fashion, sir?

A. There were discussions on many occasions as to where could we find such an unique relationship, and from time to time this was thought through, but at no time was there ever a conclusion that this should be curtailed.

(19)

Q. Did any director ever make a proposal that perhaps the relationship should be curtailed, sir?

A. The discussions were that if it were advisable to, then we should evaluate it and curtail it, but in none of the final conclusions did the conclusion that we should curtail it.

Q. Do you remember the name of the director or directors who suggested that the relationship should be discontinued?

A. Myself. Yes, I did.

Q. Did the board study your proposal, sir?

A. Yes.

Q. As a result of that study what did the board determine, sir?

A. That the unique relationship of this assembling organization, and its standards of quality that had been developed over the period of 24 years of existence, was too precious to tamper with.

Q. Was this the unanimous decision of the board, sir?

A. Yes.

Q. You then, I take it, agreed with this decision?
A. Yes.

* * *

(23)

Q. Are there any other items of inventory purchased through a clearing agent, or through the same setup that you have for produce, sir?

A. I don't understand the question.

Q. Well, for example, does Giant sell meat products to the public, sir?

A. Oh, yes. I think I now understand. I said before that in areas where we have a jungle—"jungle" meaning that there aren't specific standards—in the general merchandise field, where there are so many varieties of socks or shirts or things of this type, we will work through a wholesaler, frequently referred to as a rack jobber.

In the purpose of groceries, where we buy Del Monte, or Libby, where there are identical standards on every particular can, we purchase from the primary source, but that is a reasonably simple operation because the standards are there.

For meat we have U. S. Government grades, and all of our meat is sold on a U. S. Government basis. There we have established standards, and so there we buy from the primary source and distribute ourselves.

Where the standards are not clear, the good will of

(24)

the customer is such that we do not just lose the profit on the particular trade in produce. If we happen to lose on a particular sale of oranges, if the consumer coming into the store gets oranges that are not good, we don't lose just the profit on the oranges, we lose the customer, and the customer's business. Our desire in the area of the jungle to have the kind of specialized knowledge we need, is such that we go to tremendous lengths in these jungle areas to get the most skillful and competent type people.

* * *

(26)

Q. Prior to the institution of the lawsuit by Mr. Futrovsky did the board of directors or did you, sir, give any thought or consideration to hiring the employees now employed by Max Shapiro?

A. Yes. I had to make the over-all thought in relation to the total cloth pattern, using the "cloth" as an advisable word. The produce managers and store managers of Giant Foods have been instructed from 1939 forward that when they get produce from Max Shapiro, that produce is coming from a wholesale operation, and if that produce in any way is not satisfactory to them, they can send it back to Max Shapiro, and that it is their responsibility to see to it that they only keep that produce that is worthy of what Giant should sell.

If we were to take these same people who are in the Max Shapiro Company and just automatically convert them to Giant, which was the question you asked me, we would lose, in our opinion, the relationship so far as the produce manager and the store manager is concerned, and the 25 years of indoctrination that we gave to them, and they would then accept whatever came out of what would now be the Giant warehouse, to the Giant store, and the customer would get the merchandise, and if the customer was dissatisfied we would not

(27)

lose the profit on the oranges, we would lose the customer, as I said before, so as a consequence when we had to weigh the whole situation, we came to the conclusion that by transferring these people we would lose something precious, and therefore we decided that we should keep it the way it is.

* * *

(28)

Q. Does Max Shapiro have any competition, sir, in its sales of produce to Giant?

A. It has the competition of keeping Giant competitive at retail, as outlined in the prospectus, and therefore it has the competition of the purchasing agents of the Great A & P Company and of the Safeway Company, and all the competition that Giant has to compete against.

* * *

(34)

Q. What percentage of produce sold by Max Shapiro to Giant is returned in the average year, sir?

A. In the period over the last year or two I would say pretty much one to two per cent is returned. The relationship between the Shapiro people and the Giant people has become such, with the standards being set over 20 to 25 years, that the need for return has become less and less.

Q. When produce is returned to Max Shapiro, can it, in turn, return that produce to the place where they purchased it?

A. They cannot.

* * *

(35)

Q. I believe you said that within the last few years one or two per cent of the produce sold of Max Shapiro to Giant was returned?

A. Yes.

Q. Was that percentage higher in the past years?

A. Yes. In the periods from 1944 to, perhaps, 1950, the ratio was much higher.

* * *

(49)

Q. If Giant, sir, were to hire directly the entire staff of Max Shapiro, it would realize a savings, would it not, sir?

A. I do not think so. The question of skill, the question of responsibility, the question of relationship—the

minute it changed there would be something lost, and this something that is lost, in my opinion—and I have seen it happen time and time and time again, where you say you will just transfer the work to another group, and everything will remain the same—somewhere along the line when you transfer certain kinds of responsibility and say, "We are going to go through the same motions and everything will remain the same," it doesn't work that way.

Q. Is it your opinion, sir, if Mr. Kramer and his fellow workers were employed by Giant, they wouldn't do the same fine job that they are doing under Max Shapiro's employment?

A. They would have a different set of standards to work by. In the case of working for Giant and shipping to Giant they no longer would have the responsibility where their merchandise could be returned to them.

They wouldn't think as a wholesaler does. There is a process of thinking when you are a wholesaler, that is

(50)

different than when you are a retailer, and if these people were retailers, if they were in the employ of Giant, somewhere in the process there would be a different kind of thinking, there would be a different kind of position-taking so far as purchases are concerned, and somewhere in this whole process we would lose the moneys that are supposedly being earned by Shapiro—that is, a question as to whether they are earned.

Q. To infuse the employees of Max Shapiro with this spirit that you have just related, is it necessary for Max Shapiro to make profits, sir?

A. In my opinion the skills of the people in Shapiro are directly traceable to their knowledge that they have to operate and produce as a wholesaler, and as a wholesaler they apply a particular and peculiar kind of effort in serving Giant that can't be captured if they are taken away from this relationship.

* * *

(56)

ISREAL COHEN, one of the defendants, called as a witness by the plaintiff, being first duly sworn by the Notary Public, testified as follows:

* * *

EXAMINATION.

By Mr. Silverman:

* * *

(60)

Q. Thank you. Now, sir, if Giant were to absorb the Max Shapiro operation, wouldn't it realize savings in the amount that you have mentioned?

A. Not in that amount, no.

Q. Why is that, sir?

A. Well, the relationship of Max Shapiro as a wholesaler wouldn't be the same as it would as a retailer. In the buying and purchasing of fresh fruits and vegetables sometimes decisions are taken that are quite risky, and as a wholesaler we can and as a retailer we wouldn't be able to take that position.

Q. Is it your testimony, sir, that in the purchase of produce Max Shapiro runs risks, sir?

A. From time to time, yes.

Q. What is the nature of those risks, sir?

A. Well, lemons, for example, can sell one day for $3 a crate, and the next day go up to twelve or thirteen. If you have a frost in Florida, your citrus fruits can go from $3 to $8 to $10.

* * *

(61)

Q. How is the price that Giant pays Max Shapiro for its produce determined, sir?

A. I would say that a substantial part of the time, on the basis of what their product costs. A substantial part of the time it is on the basis of what the market compels Max Shapiro to sell, based on a competitive situation.

* * *

(62)

Q. Do you, sir, ever negotiate with Mr. Kramer?

A. I don't think it is a question of negotiating. The function of Max Shapiro is to provide perishables for Giant Foods, and keep Giant Foods at all times competitive with the market.

Q. Has Mr. Kramer on behalf of Max Shapiro ever accepted a lower price for produce than he has asked Giant to pay?

(63)

A. Oh, sure. Let me understand your question correctly.

(The reporter read the last question as follows:

"Q. Has Mr. Kramer on behalf of Max Shapiro ever accepted a lower price for produce than he has asked Giant to pay?")

The Witness: Yes.

By Mr. Silverman:

Q. Is that a usual process, sir, or an unusual process?

A. I would say that it is—that Kramer sets the price not necessarily on what he pays for it, but what Giant has to pay for it in order to be able to resell it on a competitive basis. For all practical purposes Kramer functions in Max Shapiro, as Max Shapiro and Giant Foods.

Q. Have you, sir, ever suggested that certain produce should be lower in price than what Max Shapiro has offered to sell it to Giant?

A. I called up this morning before I left. Safeway was selling corn at six for 29, and we were five for 29, and I asked him if he changed the price, and he said yes. We were six for 29 on a retail basis, and naturally the wholesale price will be changed.

Q. Are prices set by Mr. Kramer for the whole Giant chain, or are the prices set individually for each store?

A. The whole chain.

(64)

Q. Would Giant be able to sell its produce at a lower price, sir, if it absorbed the Max Shapiro operation?

A. I don't think so.

EXTRACT FROM PROSPECTUS OF GIANT FOOD INC. OF NOVEMBER 12, 1959.

(Plaintiff's Deposition Exhibit A for Identification.)

INTEREST OF MANAGEMENT AND OTHERS IN CERTAIN TRANSACTIONS.

The Company purchases its fruits and vegetables from Max Shapiro, a partnership. The beneficial interests in the partnership are held by the individuals listed under "Principal Holders of Securities—Beneficial Ownership" herein and members of their immediate families, except that N. M. Cohen and Joseph B. Danzansky have no beneficial interest in the partnership. In the partnership's fiscal year ended January 31, 1959, Max Shapiro's net sales to the Company amounted to $7,657,805, or approximately 8% of GIANT's total purchases. This amount represented 100% of Max Shapiro's total sales and 100% of the Company's fresh produce purchases during the period. The prices quoted by Max Shapiro to GIANT are dictated by competitive circumstances, and the partnership's net earnings for the fiscal year ended January 31, 1959, before income taxes, partners' salaries and withdrawals, were $334,715 or about 4.4% of Max Shapiro's net sales to GIANT. In the past seven fiscal years the corresponding net earnings of Max Shapiro varied from a low of 3.5% to a high of 4.4% of net sales to GIANT. Max Shapiro rents its produce warehouse from the Company under a lease which requires rental payments of $72,000 per year and still has eight years to run. The data contained in this paragraph regarding Max Shapiro are derived from audited statements of the partnership prepared by Schultz, Sorin & Co., independent Certified Public Accountants. It is the intention of the partners of Max Shapiro that net profits of the partnership in future years continue in the percentage range established in the past seven years.

COMPLAINT.

Plaintiff, by his attorneys, Cohen & Morris, Esqs., as and for his complaint, alleges upon information and belief except paragraph "1", which is alleged upon knowledge:

1. Plaintiff is a shareholder of Giant Foods, Inc. (the "Company"), owning 50 shares of the Company's Class "A" non-voting stock. He has been a shareholder at all times since 1959.

2. Plaintiff brings this action derivatively on behalf of the Company and representatively on behalf of himself and all other shareholders similarly situated.

3. The Company is a Delaware corporation, and has been engaged in the management and operation of supermarkets located primarily in the Washington, D. C. area.

4. The individual defendants are all non-residents of the State of Delaware.

(a) Defendants N. M. Cohen, Jacob Lehrman, Israel Cohen, Joseph B. Danzansky, and Charlotte Ferson Lehrman are and have been the Company's directors.

(b) In addition to their positions as directors, N. M. Cohen is and has been the Company's president; Jacob Lehrman is and has been the Company's secretary and executive vice-president; and Israel Cohen is and has been the Company's vice-president. Emanuel Cohen is and has been the Company's treasurer.

(c) Israel Cohen, Emanuel Cohen, and Lillian C. Solomon (sometimes referred to collectively as the "Cohen Family") own, between them, the entire beneficial interest in Max Shapiro, a partnership that supplies and has supplied the Company with all its fresh produce requirements.

5. (a) The Company has 250,001 voting securities. The Cohen interests own 125,000 voting shares (Class AC) and are entitled to elect 2 directors; the Lehrman interests own 125,000 voting shares (Class AL) and are entitled to elect 2 directors; and Joseph B. Danzansky owns 1 voting share (Class AD), and is entitled to elect 1 director.

The individual defendants own the following voting shares of the Company:

Israel Cohen	—	41,500	Class AC
Emanuel Cohen	—	41,500	Class AC
Lillian Cohen Solomon	—	41,500	Class AC
N. M. Cohen	—	500	Class AC
Total:		125,000	Class AC *
Jacob Lehrman	—	125,000	Class AL
Joseph B. Danzansky	—	1	Class AD

* N. M. Cohen, as trustee, is the record owner of all the Class AC stock, and has the sole power to vote said shares.

(b) The shares in the hands of the public, which are traded on the American Stock Exchange (Class A), are non-voting.

6. The Cohens and Lehrmans, through their (1) ownership of virtually all of the Company's voting securities and (2) official positions with the Company control and dominate the Company's affairs. This control and domination is used to benefit themselves, and to harm the Company, as set forth below.

7. The Cohen Family, with the consent and approval of Jacob Lehrman and Charlotte Ferson Lehrman (sometimes referred to collectively as the "Lehrman Family"), devised a means of diverting to themselves monies and profits which should inure to the sole benefit of the Company and its shareholders.

8. The means used by the Cohen Family to effectuate this illegal purpose was the formation of a partnership doing business under the firm name and style of Max Shapiro.

9. (a) Max Shapiro's sole and entire business is to supply the Company with fresh produce.

(b) The Company purchases all of its fresh produce from Max Shapiro.

10. Max Shapiro enjoys a particularly favorable relationship with the Company:

(a) Max Shapiro rents the Company's warehouse on very advantageous terms;

(b) Max Shapiro uses, as its principal officers, defendants Israel Cohen and Emanuel Cohen, who are each paid $67,600 per year by the Company, none of which is reimbursed by Max Shapiro.

(c) The Company is committed to purchase daily from Max Shapiro everything that Max Shapiro purchases. Thus Max Shapiro is assured of a ready market for which it need incur no risk whatsoever.

(d) The daily purchases by the Company of Max Shapiro's entire inventory permits Max Shapiro to operate without any invested capital.

11. The Company does not need the services of Max Shapiro.

(a) Max Shapiro's main facility, its warehouse, is owned by the Company.

(b) Max Shapiro's principal officers are full time employees and officers of the Company.

12. Despite the facts that Max Shapiro (1) performs a function that could and should be performed by the Com-

pany, (2) incurs no risks in performing this function, and (3) has no capital invested, nevertheless it is able to realize substantial profits from its dealings with the Company.

(a) In the fiscal year 1963, Max Shapiro made a profit of $368,350; in fiscal year 1962, a profit of $446,428; and in fiscal year 1961 a profit of $400,885.

13. Although Max Shapiro has none of the ordinary business risks which the Company has, it nevertheless realizes a much higher rate of profit on its sales than does the Company:

	The Company	*Max Shapiro*
	1960	
Gross Sales	$131,927,000	$7,598,000
Profit Before Taxes	3,018,000	334,715
Profit as a Per Cent of Gross Sales	2.3%	4.4%
	1961	
Gross Sales	$146,723,000	$8,787,000
Profit Before Taxes	3,965,000	400,885
Profit as a Per Cent of Gross Sales	2.7%	4.5%
	1962	
Gross Sales	$162,062,000	$9,264,000
Profit Before Taxes	3,798,000	446,428
Profit as a Per Cent of Gross Sales	2.3%	4.8%
	1963	
Gross Profits	$179,124,000	$9,473,000
Profit Before Taxes	2,758,000	368,350
Profit as a Per Cent of Gross Sales	1.5%	3.9%

14. If the profits diverted to Max Shapiro had, instead, been retained by the Company, the Company's pre-tax earnings would have been increased by the following percentages:

Fiscal Year Ended January 28	*Percentage Increase in Company's Pre-Tax Earnings*
1960	11.1%
1961	10.1
1962	11.7
1963	13.3

15. It is the practice and custom for supermarket chains to purchase all of their inventory, including produce, directly from the supplier, thus eliminating any profits that might otherwise accrue to middlemen and wholesalers.

(a) The Company follows this practice and custom for all of its inventory items, except for produce. The only reason for this exception is to divert to Max Shapiro monies and profits that should belong to the Company and its shareholders.

16. The Cohen and Lehrman families together enjoy favorable positions as landlords of at least 3 of the Company's supermarkets. As landlords, they receive annual rents of at least $234,000. The Lehrman family thus also benefits from its relationship with the Company.

17. The above transactions constitute a waste and spoliation of the Company's assets, and constitute violations by each of the individual defendants of the fiduciary duties they owe to the Company and its shareholders.

(a) Each of the individual defendants is liable, jointly and severally, for participating in, authorizing, and allowing, through negligence and gross negligence, the aforementioned wrongs.

18. Demand upon the Company's board of directors is unnecessary for at least the following reasons:

(a) Each of the directors is liable for the wrongs set forth above;

(b) Each of the directors participated in and allowed, through negligence and gross negligence, the wrongs set forth above; and

(c) The institution of this action by the directors would place it in hostile hands and would prevent its effect prosecution.

19. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays for judgment as follows:

A. An order pursuant to 10 Del. C. Section 366, requiring the non-resident defendants to appear by a day certain and authorizing sequestration of their property in Delaware and appointing a Sequestrator to hold the same;

B. An order requiring the individual and partnership defendants to account to the Company for its losses and their gains and profits;

C. An order awarding plaintiff his attorney and counsel fees, and for any other expenses incurred in this action; and

D. For such other and further relief as may be just and necessary.

IRVING MORRIS,
COHEN & MORRIS,
North American Building,
Wilmington, Delaware,
Attorneys for Plaintiff.

ANSWER OF INDIVIDUAL DEFENDANTS.

First Defense.

Defendants Emanuel Cohen, Jacob Lehrman and Israel Cohen, appearing in their individual capacities only and not as partners of Max Shapiro, and N. M. Cohen, appearing as an individual, answer the complaint as follows:

1. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the complaint and demand strict proof thereof, except that they admit that 50 shares of Giant's Class A stock have been registered in the name of Charles J. Futrovsky since December, 1959.

2. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of the complaint.

3. These defendants admit the allegations of paragraph 3 of the complaint.

4. In answer to the allegations of paragraph 4 of the complaint, these defendants admit that the individual defendants are all non-residents of the State of Delaware and that defendants N. M. Cohen, Jacob Lehrman, Israel Cohen, Charlotte Ferson Lehrman and Joseph B. Danzansky are and have been since 1959 the directors of the company and that the following defendants hold and have held since 1959 the offices in the company set opposite their respective names:

N. M. Cohen	President and General Manager
Jacob Lehrman	Executive Vice President and Secretary
Israel Cohen	Vice President in Charge of Operations
Emanuel Cohen	Treasurer

Except as admitted by the foregoing, the allegations of paragraph 4 of the complaint are denied.

5. In answer to the allegations of paragraph 5 of the complaint, these defendants admit that the Company has 250,001 voting securities; that Israel Cohen, Emanuel Cohen, and Lillian Cohen Solomon each own beneficially 41,500 shares of the Company's Class AC stock; that N. M. Cohen owns beneficially 500 shares of the Company's Class AC stock; that N. M. Cohen, as Trustee, is the record owner of all the Class AC stock and has the sole power to vote said shares and that the record owners of Class AC stock are entitled to two Directors; that Jacob Lehrman owns beneficially and of record 125,000 shares of the Company's Class AL stock, and that the holders of Class AL stock are entitled to elect two Directors; that Joseph B. Danzansky owns beneficially and of record 1 share of the Company's Class AD stock, and that the holders of Class AD stock are entitled to elect one Director; and that the shares in the hands of the public which are traded on the American Stock Exchange (Class A) are non-voting. Except as admitted by the foregoing, the allegations of paragraph 5 of the complaint are denied.

6. These defendants deny the allegations of paragraph 6 of the complaint.

7. These defendants deny the allegations of paragraph 7 of the complaint.

8. These defendants deny the allegations of paragraph 8 of the complaint.

9. These defendants deny the allegations of paragraph 9 of the complaint.

10. These defendants deny the allegations of paragraph 10 of the complaint.

11. These defendants deny the allegations of paragraph 11 of the complaint.

12. These defendants deny the allegations of paragraph 12 of the complaint, except that they admit that in the fiscal year ending January 26, 1963 Max Shapiro made a profit before income taxes and partners' salaries of $368,350, in the fiscal year ending January 27, 1962 a similar profit of $446,428, and in the fiscal year ending January 28, 1961 a similar profit of $400,885.

13. These defendants admit that the consolidated gross sales, consolidated profit before taxes and consolidated profit as a percent of consolidated gross sales of the Company and subsidiaries for the fiscal years 1960 through 1963 are correctly stated in paragraph 13 of the complaint; and that the gross sales by Max Shapiro to the Company and its subsidiaries, Max Shapiro's profit before taxes, partners' salaries and withdrawals, and Max Shapiro's profit as a percent of its gross sales to the Company and its subsidiaries are correctly stated in paragraph 13 of the complaint, except that for fiscal year 1960 the gross sales by Max Shapiro to the Company and its subsidiaries were $8,276,055, its profit before taxes was $351,519 and its profit as a percent of its gross sales to the Company and its subsidiaries was 4.2%. Except as admitted by the foregoing, the allegations of paragraph 13 of the complaint are denied.

14. These defendants deny the allegations of paragraph 14 of the complaint.

15. These defendants deny the allegation of paragraph 15 of the complaint.

16. These defendants deny the allegations of paragraph 16 of the complaint.

17. These defendants deny the allegations of paragraph 17 of the complaint.

18. These defendants deny the allegations of paragraph 18 of the complaint.

19. In answer to paragraph 19 of the complaint, these defendants allege that plaintiff has no remedy whatsoever, at law or in equity, for the reason that defendants have committed no wrong.

SECOND DEFENSE.

20. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE.

21. Plaintiff has failed, without justification or legal excuse, to make demand upon the Board of Directors of the Company that their claim or claims, if any, set forth in the complaint be asserted by the Company.

22. The allegations of paragraph 18 of the complaint fail to constitute sufficient reason for non-compliance with Rule 23(b) of the Rules of this Court and do not state a claim upon which relief can be granted.

FOURTH DEFENSE.

23. In December, 1959, when plaintiff first became a registered owner of shares of the Company, the Company's then current prospectus, dated November 12, 1959, which on information and belief plaintiff received at the time of his purchase of his shares of the Company, stated, among other things, substantially as follows:

> "The Company purchases its fruits and vegetables from Max Shapiro, a partnership. The beneficial interests in the partnership are held by the individuals listed under 'Principal Holders of Securities—Beneficial Ownership' herein and members of their immediate families, except that N. M. Cohen and Joseph B. Danzansky have no beneficial interest in the partnership. In the partnership's fiscal year ended January 31, 1959, Max Shapiro's net sales to the Company

amounted to $7,657,805, or approximately 8% of GIANT's total purchases. This amount represented 100% of Max Shapiro's total sales and 100% of the Company's fresh produce purchases during the period. The prices quoted by Max Shapiro to GIANT are dictated by competitive circumstances, and the partnership's net earnings for the fiscal year ended January 31, 1959, before income taxes, partners' salaries and withdrawals, were $334,715 or about 4.4% of Max Shapiro's net sales to GIANT. In the past seven fiscal years the corresponding net earnings of Max Shapiro varied from a low of 3.5% to a high of 4.4% of net sales to GIANT. Max Shapiro rents its produce warehouse from the Company under a lease which requires rental payments of $72,000 per year and still has eight years to run. The data contained in this paragraph regarding Max Shapiro are derived from audited statements of the partnership prepared by Schultz, Sorin & Co., independent Certified Public Accountants. It is the intention of the partners of Max Shapiro that net profits of the partnership in future years continue in the percentage range established in the past seven years.

"The leases on seven of the Company's stores have been entered into with Giant Food Properties, Inc., a corporation in which N. M. Cohen, Mr. and Mrs. Jacob Lehrman, Emanuel Cohen, Israel Cohen, and Mr. and Mrs. Lawrence P. Solomon have an aggregate common stock ownership estimated at approximately 15%. The minimum aggregate annual rental on the above seven leases is $518,000. The Company has also agreed to lease space in one other shopping center which Giant Food Properties, Inc. is developing or planning to develop.

"These same individuals, with the exception of N. M. Cohen, own a 50% interest in a shopping center

at 1909 Willow Lawn Drive, Richmond, Va., where the Company operates a supermarket. A 35% interest in a shopping center at 3100 Queen's Chapel Road, Hyattsville, Md., where the Company operates a supermarket, is owned by the individuals listed in 'Principal Holders of Securities—Beneficial Ownership' herein with the exception of N. M. Cohen. Giant Food Profit Sharing Plan owns 100% of the stock of a corporation which in turn owns a shopping center at Columbia Pike and Little River Turnpike, Annadale, Va., where the Company operates a supermarket.

"In each case the terms of the foregoing leases (copies of which are exhibits to the Registration Statement) are deemed by the Company to be comparable with the terms of leases executed by the Company in cases where no affiliation exists.

"All other leases executed by the Company have been entered into with non-affiliated landlords.

"In addition, the Company expects, in 1960, to lease a store to be built on property located on Annapolis Road in Prince Georges County, Maryland, in which Jacob Lehrman, Israel Cohen, Emanuel Cohen and Mrs. Lawrence Solomon hold a 90% interest as tenants under a 99-year lease."

Reference is made to said prospectus for the full and exact contents thereof.

24. Similar full and fair disclosures were made by the Company in prospectuses dated February 24, 1961, October 4, 1961, February 13, 1963 and October 29, 1963. Said prospectuses are on file with the Securities and Exchange Commission and the American Stock Exchange and open to inspection by plaintiff and all other stockholders of the Company. Reference is made to said prospectuses for the full and exact contents thereof.

25. The stockholders of the Company, including the plaintiff, have waived any claim or claims stated in the complaint.

FIFTH DEFENSE.

26. Paragraphs 23 and 24 of this answer are incorporated herein by reference.

27. The alleged claim or claims, if any, set forth in the complaint are barred by the statute of limitations.

SIXTH DEFENSE.

28. Paragraphs 23 and 24 of this answer are incorporated herein by reference.

29. The alleged claim or claims, if any, set forth in the complaint are barred by laches.

SEVENTH DEFENSE.

30. Paragraphs 23 and 24 of this answer are incorporated herein by reference.

31. The stockholders of the Company, including the plaintiff, are estopped to assert the claim or claims, if any, alleged in the complaint.

EIGHTH DEFENSE.

32. The transactions referred to in the complaint were ratified and approved by all the stockholders of Giant and, therefore, plaintiff is barred from maintaining this action.

WHEREFORE, these defendants pray for the entry of judgment in their favor dismissing the complaint and assessing costs against plaintiff.

BERL POTTER & ANDERSON,

By RICHARD F. CORROON,
350 Delaware Trust Building,
Wilmington, Delaware,
Attorneys for Defendants.

NOTICE TO STOCKHOLDERS.

To the Stockholders of Giant Food Inc.:

This is to inform you of certain developments in the above lawsuit. A Stipulation of Settlement has been signed for the settlement of this case, which is conditioned upon a finding by the Court that the settlement is fair and reasonable and should be consummated. In accordance with the procedure in such situations, the Court has directed that a hearing be held before it passes upon the fairness and reasonableness of the settlement.

You are hereby notified that pursuant to an order of the Vice Chancellor of the State of Delaware, dated December 23, 1964, in accordance with Rule 23(c) of the Rules of the Court of Chancery of the State of Delaware, a hearing upon the fairness of the settlement will be held in the courtroom of the Court of Chancery of the State of Delaware, in and for New Castle County, Eleventh and King Streets, Wilmington, Delaware, at 10.30 o'clock A. M., Eastern Standard Time, on January 27, 1965. Any stockholder of Giant Food Inc. ("Giant") may show cause, if any he has, at the hearing why the settlement of this action, as provided in the Stipulation of Settlement, should not be approved by the Court as fair and reasonable and why this action should not be dismissed, as provided in the Stipulation of Settlement. The hearing may be adjourned from time to time by announcement at the hearing or at any adjournment thereof without further notice.

The plaintiff in this action is a stockholder of Giant, who acquired his shares in December, 1959. The action was instituted derivatively purportedly in behalf of and for the benefit of Giant. It was commenced on February 13, 1964.

The defendants, N. M. Cohen, Emanuel Cohen, Jacob Lehrman and Israel Cohen, have appeared in this action. No other defendants have been served or appeared in the

action. Each of the defendants who has entered an appearance has joined in the Stipulation of Settlement.

The complaint alleges that Giant has been engaged in the management and operation of supermarkets located primarily in the Washington, D. C. area; that the individual defendants have been directors of Giant, and that Israel Cohen, Emanuel Cohen and Lillian C. Solomon ("Cohen Family") own between them the entire beneficial interest in Max Shapiro, a partnership that supplies Giant with all its fresh produce requirements. It is alleged that of Giant's 250,001 shares of voting stock, the Cohen and Lehrman interests own 250,000; that Joseph B. Danzansky owns the remaining share; and that the Cohens and Lehrmans dominate and control the affairs of Giant.

The complaint charges that the Cohen Family, with the consent and approval of the Lehrmans, formed a partnership named Max Shapiro; that Max Shapiro's sole business is to supply Giant with fresh produce; that Giant purchases all of its produce from Max Shapiro; that Max Shapiro rents a warehouse from Giant on very advantageous terms; that Max Shapiro uses Israel Cohen and Emanuel Cohen as its principal officers, although each of them are paid $67,600 per year by Giant, none of which is reimbursed by Max Shapiro; that Giant is committed to purchase from Max Shapiro everything that Max Shapiro purchases, and thus has a ready market at no risk; and that daily purchases by Giant of Max Shapiro's entire inventory permit the latter to operate without any invested capital. It is also charged that Max Shapiro has realized substantial profits from its dealings with Giant, e.g., $368,350 in the fiscal year 1963, $446,428 in the fiscal year 1962, and $400,885 in the fiscal year 1961; that Max Shapiro realizes a much higher rate of profit on its sales than does Giant; and that if the profits allegedly diverted to Max Shapiro had been retained by Giant, Giant's earnings would have been increased. It is alleged that it is the practice and custom of supermarket chains to purchase all

of their inventory, including produce, directly from the supplier, thus eliminating profits that might otherwise accrue to middlemen and wholesalers; that Giant follows this practice for all of its inventory items, except produce; and that the only reason for this exception is to divert to Max Shapiro monies and profits that should belong to Giant and its stockholders.

It is also alleged in the complaint that the Cohen and Lehrman families together enjoy favorable positions as landlords of at least three of Giant's supermarkets and that as landlords they receive annual rents of at least $234,000.

The complaint charges that the above transactions constitute a waste of Giant's assets, for which the defendants should account to Giant.

The defendants have disclaimed any wrongdoing or liability whatsoever. The appearing defendants have answered the complaint and deny each and every material allegation contained therein and assert that the charges made by the plaintiffs against them are entirely without merit.

The defendants contend that when Max Shapiro was first purchased in 1944, at a time when all the outstanding stock of Giant was owned by members of the Cohen and Lehrman families, it was for the benefit of Giant since Max Shapiro had OPA quotas for produce which were unavailable to Giant, and that thereafter Max Shapiro's quotas were made available to Giant, thus permitting it to sell greater quantities of produce. When Giant first sold its shares to the public in the fall of 1959, its then current prospectus, dated November 12, 1959, fully disclosed the relationships between Max Shapiro and Giant and also fully disclosed the leases to Giant of stores in which members of the Cohen and Lehrman families had interests, including a lease which Giant expected to enter into in 1960 of a store in which members of those two families had interests on Annapolis Road in Prince George's

County, Maryland. The prospectus also stated that in the seven fiscal years preceding January 31, 1959 the net earnings of Max Shapiro varied from 3.5% to 4.4% of net sales to Giant and that it was the intention of the partners of Max Shapiro that net profits of the partnership in future years would continue in such percentage range. Defendants contend that in 1959, when Giant first sold its shares to the public, the members of the Max Shapiro partnership had a choice of either keeping their partnership interests or transferring them to Giant and that if they had done the latter, the capitalized value of the partnership interests would have been approximately $3,000,000, for which they would have received appropriate compensation. The defendants also contend that the continued existence of Max Shapiro and its dealings with Giant is for the best interest of Giant in that it insures Giant's ability to obtain produce of a superior quality than could be obtained from other wholesalers.

The plaintiff, through his attorneys, has made a thorough investigation into the facts and circumstances involved in this action. His attorneys have taken the oral depositions of Emanuel Cohen, Israel Cohen and Jacob Lehrman, as individuals and as Vice President, Treasurer and Executive Vice President, respectively, of Giant. In addition, plaintiff, through his attorney, has inspected a large amount of documentary material.

In order to avoid further expenses, inconvenience and the distraction of burdensome and uncertain litigation, and to put to rest all controversy, the parties have agreed to a compromise of the litigation which has been incorporated in a Stipulation of Settlement, subject to the approval of the Court. The principal terms of the Stipulation of Settlement are as follows:

1. A contract will be entered into between Max Shapiro and Giant, whereby Max Shapiro will agree that its net earnings after management salaries (which are limited to an aggregate of $50,000 per year during the term of the

contract) but before income taxes and withdrawals will not exceed 3.9% of Max Shapiro's net sales to Giant or $350,000, whichever is lower; provided, however, that for the fiscal year ended January 31, 1966 Max Shapiro's net earnings shall be limited to 3.9% of its net sales to Giant or $325,000, whichever is lower. For the fiscal year ended January 25, 1964, Max Shapiro's net earnings were $403,767. For the fiscal year ending January 31, 1965 it is estimated that net sales by Max Shapiro will amount to $10,700,000. 3.9% of such figure is $417,300. For the fiscal year ending January 31, 1966 it is estimated that net sales by Max Shapiro to Giant will amount to $12,100,000. 3.9% of such figure is $571,900. The contract between Max Shapiro and Giant will be for a term of ten years, at the end of which Giant will have an option to buy the business of Max Shapiro, including Max Shapiro's equipment, office furniture, tractors and trailers, trade-names, trade-marks and good will, but excluding Max Shapiro's cash, securities, accounts receivable, liabilities and other partnership assets not heretofore specifically enumerated for $1,500,000, payable in cash.

2. Giant will pay plaintiff's attorneys the disbursements incurred in the prosecution and settlement of this action, plus the sum of $100,000 as payment in full of all expenses, including attorneys, counsel and accountants fees incurred by plaintiff, his attorneys, counsel and accountants, if any, in this action.

3. Giant shall execute and deliver to Max Shapiro, to each of the individual defendants, and to all past or present directors of Giant a release discharging each of them from any and all claims arising out of the matters alleged in the complaint.

4. An order shall be entered by the Court approving the Stipulation of Settlement and dismissing the complaint with prejudice as to each of the defendants who is a party

to the Stipulation of Settlement and the past or present directors of Giant who have been named as defendants in the action and who shall have entered an appearance therein before the entry of such order of the Court.

At the hearing on January 27, 1965, any stockholder of Giant or party to this action may present any evidence that may be relevant to the issues to be heard; provided, however, that no such person who is not a party to the Stipulation of Settlement shall be heard and no papers or briefs submitted by any such person shall be received or considered by the Court, except by special permission of the Court, unless on or before January 22, 1965 a notice of intention to appear, a statement of the position to be asserted and of the grounds therefor, and copies of such papers and briefs are served on Irving Morris, Esquire, 1101 Bank of Delaware Building, Wilmington, Delaware, attorney for the plaintiff; Pomerantz Levy Haudek & Block, 295 Madison Avenue, New York, New York, of counsel to the plaintiff; Howard M. Handelman, Esquire, 1006 Bank of Delaware Building, Wilmington, Delaware, attorney for Giant; and Richard F. Corroon, Esquire, 350 Delaware Trust Building, Wilmington, Delaware, attorney for the defendants, N. M. Cohen, Emanuel Cohen, Jacob Lehrman and Israel Cohen, and filed with the Register in Chancery, Public Building, Eleventh and King Streets, Wilmington, Delaware. The Stipulation of Settlement, the depositions and exhibits referred to therein, all documents produced by defendants for examination by plaintiff's attorneys, and all pleadings and other documents in the action will be on file on and after January 4, 1965 with the Register in Chancery, Public Building, Eleventh and King Streets, Wilmington, Delaware, and available for inspection either by any stockholder of the corporation, in person or by duly authorized attorney, during regular hours on each day other than Saturdays, Sundays and other legal holidays.

By Order of the Court of Chancery of the State of Delaware, in and for New Castle County.

GIANT FOOD INC.

By .....
Secretary.

Dated: Wilmington, Delaware,

....., 1965.

FINAL ORDER OF THE COURT OF CHANCERY.

This 3rd day of February, 1965, this action having come on for hearing on January 27, 1965 pursuant to the Order of this Court entered herein on December 23, 1964 for the purpose of considering the adequacy and fairness of the Stipulation of Settlement herein, which, among other things, provides for the payment of the sum of $100,000 to Messrs. Cohen, Morris & Rosenthal, attorneys for the plaintiff, plus the disbursements incurred in the prosecution and settlement of this action, and it appearing that notice of the hearing on January 27, 1965 was given to all stockholders of Giant Food Inc. of record at the close of business on December 23, 1964 in accordance with the terms of the Order of December 23, 1964, and Jesse A. Cash, and Leonard S. Goodman and Barbara L. Goodman having filed their objections to the proposed settlement of this action and having been heard, and the Court having duly considered the evidence and arguments offered in support of the settlement and compromise and the objections thereto, and it appearing that the settlement is fair, adequate and reasonable and in the best interests of Giant Food Inc. and all its stockholders, it is

ORDERED, ADJUDGED AND DECREED:

1. The settlement and compromise of this action, as provided in the Stipulation of Settlement, dated December 23, 1964, which has been filed in this action, and said Stipulation are approved and found to be fair, adequate and reasonable and in the best interests of Giant Food Inc. and all its stockholders.

2. The complaint in the above action is dismissed with prejudice and judgment is entered in favor of the defendants, N. M. Cohen, Emanuel Cohen, Jacob Lehrman and Israel Cohen.

3. Plaintiffs and defendants are directed to make effective the settlement and compromise of this action in accordance with the terms and conditions of the Stipulation of Settlement, dated December 23, 1964, and upon execution of the contract referred to in paragraph 1 of said Stipulation, Giant Food Inc. is directed to execute and deliver a release in the form attached to said Stipulation to each of the persons named in said release.

4. The Court hereby reserves jurisdiction of this cause with respect to all matters relating to the consummation of the settlement and, in particular, with respect to the award of counsel fees and expenses to the attorneys and counsel for plaintiff.

/s/ ISAAC D. SHORT, 2ND,
Vice Chancellor.